IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 209

JOSEPH LYLE STONER, *Petitioner,*

v.

CALIFORNIA, *Respondent.*

REPLY BRIEF FOR PETITIONER

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INDEX

Citations

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Preliminary Statement

In its brief, the State concedes that the holding below cannot be reconciled with *Agnello* v. *United States*, 269 U.S. 20 (1925)—*i.e.*, it concedes that the search of petitioner's hotel room and the seizure of his possessions were not incident to his arrest (Br. p. 8). However, the State claims that petitioner's conviction should nevertheless be affirmed for reasons which the court below did not see fit to endorse.

First, the State contends that the police could lawfully conduct a "systematic search" (R. 72) of petitioner's room in his absence, without a warrant and without his permission, because a hotel clerk unlocked the room and said, "Be my guest." (Br. pp. 9-14.) Second, the State contends that, having searched the room with such "consent,"

the police could lawfully seize, not only a gun, but also petitioner's glasses and clothing as "instrumentalities" of crime, or in any event as evidence (Br. pp. 15-21). Third, the State contends that, regardless of the legality of the search and the seizure, the use of the property seized as evidence at petitioner's trial was in fact mere "harmless error." (Br. pp. 22-28.)

The State is wrong on each count.

1. The fact that the hotel clerk let the police into petitioner's room did not justify the search. Since it was petitioner's privacy that was at stake and not the clerk's, the relevant constitutional protections were not the clerk's to waive. Accordingly, the clerk had no power to "consent" to the search—either under California law or under the Fourteenth Amendment—and the police could not reasonably suppose that he did. *United States* v. *Jeffers*, 342 U.S. 48 (1951); *Lustig* v. *United States*, 338 U.S. 74 (1949); *Chapman* v. *United States*, 365 U.S. 610 (1961); *People* v. *Burke*, 208 Cal. App. 2d 149, 24 Cal. Rptr. 912 (1962).

2. Moreover, even if the entry and search had been lawful, the seizure could not be defended. Petitioner's glasses and clothing were neither contraband nor the fruits or instrumentalities of crime, articles traditionally subject to seizure because their possessor has no right to them. On the contrary, the glasses and clothing were lawfully in petitioner's possession; they were seized solely because the police thought they might be useful as evidence. This Court has held repeatedly that such seizures are invalid even when pursuant to warrants. *E.g.*, *Boyd* v. *United States*, 116 U.S. 616 (1886). The constitutional considerations underlying such decisions are all the more compelling when, as in this case, the seizure was without a warrant.

3. Finally—although the use of unconstitutionally ob-

tained evidence should require reversal without any special showing of prejudice, *Williams* v. *United States*, 263 F.2d 487, 490 (D.C. Cir. 1959); *Honig* v. *United States*, 208 F.2d 916, 921 (8th Cir. 1953)—there can be no doubt in this case that "there is a reasonable possibility that the evidence . . . might have contributed to the conviction." *Fahy* v. *Connecticut*, 375 U.S. 85, 86-87 (1963). Accordingly, the use of the evidence at petitioner's trial was not "harmless error."

We discuss each of these issues in greater detail below.

I. The Search Was Unconstitutional Notwithstanding the Fact that a Hotel Clerk Let the Police Into Petitioner's Room.

The State in effect concedes that the search here at issue, if conducted without consent, was unconstitutional. Moreover, the State does not (nor could it) argue that petitioner consented. However, the State argues here, as it did below, that the "consent" by the hotel clerk suffices because of certain alleged local law doctrines respecting the actual or apparent authority of a clerk to give such consent.

While the lower court erred in grounding its decision upon the "incident to arrest" doctrine, it would have compounded the error by accepting this "consent" argument, for the State's theory is flatly opposed to this Court's decisions, is without support in California law, and is unsound in principle.

To take this Court's decisions first, the State's argument wholly ignores three dispositive cases cited in our opening brief—*United States* v. *Jeffers*, 342 U.S. 48 (1951), *Lustig* v. *United States*, 338 U.S. 74 (1949), and *Chapman* v. *United States*, 365 U.S. 610 (1961).

In *Jeffers*, the assistant manager of a hotel allowed police to enter and search a room in the occupants' absence with-

out a warrant. This Court held the search unconstitutional both as to the occupants and as to their nephew whose narcotics the police had seized. The Court noted that the law "does not prohibit every entry, without a warrant, into a hotel room." 342 U.S., at 51. As may be the case here, "[I]mplied or express permission is given to such persons as maids, janitors, and repairmen" to enter rooms "in the performance of their duties." *Ibid.* But as is plainly the case here, while "exceptional circumstances" might justify entry by the police without a warrant, no such circumstances exist where there "was no question of violence, no movable vehicle was involved, nor was there an arrest or imminent destruction, removal or concealment of the property intended to be seized. In fact, the officers . . . could have easily prevented any such destruction or removal by merely guarding the door." *Id.*, at 52.[1]

In *Lustig*, the manager of a hotel allowed police to enter and search a room in the occupants' absence, again without a warrant. That search, too, was held unconstitutional. Although the decision was by a divided Court, no Justice suggested that the manager's actions somehow validated the search.

In *Chapman*, the defendants' landlord allowed police to enter and search their house in their absence without a warrant. Again this Court held the search unconstitutional. The Government argued that Georgia law gave the landlord the right to enter to view waste and to bring the officers with him for this purpose. 365 U.S., at 616. The Court—noting an absence of relevant Georgia decisions—rejected

[1] See also, *e.g.*, *People* v. *Bankhead*, 27 Ill. 2d 18, 187 N.E. 2d 705 (hotel's rights with respect to control of and access to rooms do not include authority to consent to searches without legal process and do not invest hotel with power to waive guests' constitutional rights); *State* v. *Warfield*, 184 Wis. 56, 198 N.W. 854 (1924) (roominghouse owner has no power to authorize police to search a lodger's room or to rummage through his effects).

the Government's argument as quite beside the point. Assuming that such was the law of the State, the officers' "'purpose in entering was [not to view waste but] to search. . . .'" *Ibid.* (quoting *Jones* v. *United States*, 357 U.S. 493, 500 (1958)). So also here: The officers' purpose in entering was not for those purposes for which hotel guests understand that their rooms may be entered—cleaning and service—but to search. Again, the Court in *Chapman* stated, "[T]o uphold such an entry, search and seizure 'without a warrant would reduce the [Fourth] Amendment to a nullity and leave [tenants'] homes secure only in the discretion of [landlords].'" *Id.*, at 616-617 (quoting *Johnson* v. *United States*, 333 U.S. 10, 14 (1948)). So also here: To uphold the search would leave hotel guests' privacy and possessions secure only in the discretion of clerks. And finally, the Court in *Chapman* observed, "'[I]t is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical . . . .'" *Id.*, at 617 (quoting *Jones* v. *United States*, 362 U.S. 257, 266-267 (1960)). So also here: Hotel employees' rights of entry have no more relevance to the problem at hand than the lessors' rights of entry did in *Chapman;* and the subtle distinctions between "lodgers" and "tenants" explained in cases cited by the State [2] have no more place in the law of search and seizure than the similarly subtle distinctions between "lessees," "licensees," "invitees" and "guests" to which the Court referred in the *Jones* case, 362 U.S., at 266.

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[2] *Fox* v. *Windemere Hotel Apt. Co.*, 30 Cal. App. 162, 157 Pac. 820 (1916); *Roberts* v. *Casey*, 36 Cal. App. 2d Supp. 767, 93 P.2d 654 (1939).

Jeffers, *Lustig*, and *Chapman*, we submit, stand for the following propositions that are controlling in the case at bar: First, the Constitution protects citizens' privacy in their dwellings, whether transient or permanent. See also *e.g.*, *Johnson* v. *United States*, 333 U.S. 10 (1948) (hotel room); *McDonald* v. *United States*, 335 U.S. 451 (1948) (boarding house room); *Eng Fung Jem* v. *United States*, 281 F.2d 803, 805 (9th Cir. 1960) (hotel room).[3] Second, this protection is not to be eroded by strained applications of the "consent" doctrine. Thus, whether or not "apparent authority" may ever be a relevant circumstance in testing the constitutionality of searches and seizures, a hotel clerk has no such apparent authority with respect to hotel rooms. Nor can state property law defining the respective rights of persons having an interest in the premises in question confer upon a hotel clerk actual authority to consent to a search of a guest's room by the police. Were the law otherwise, the privacy of many citizens would no longer be secure, not because the policy of the Fourth Amendment has become less significant with the passing of time, but simply because our society has become more mobile.

Thus, respondent's argument respecting both actual and apparent authority is foreclosed by *Jeffers*, *Lustig*, and *Chapman*, whatever might be said concerning state law. Curiously enough, however, in view of respondent's argument, the fact of the matter is that in all material respects California law is entirely consistent with these decisions. That is, while in some circumstances California courts have applied an apparent authority test in search and seizure cases, at the same time it appears that in California hotel clerks do not have either actual or apparent authority to consent to searches of guests' rooms.

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[3] For similar state court decisions, see Annot., *Transiently Occupied Room in Hotel, Motel, or Roominghouse as within Provision Forbidding Unreasonable Searches and Seizures*, 86 A.L.R. 2d 984, 987-988 (1962).

The California decision cited by the State that is clearly in point—and that may explain the lower court's refusal to accept the State's argument in the case at bar—is *People* v. *Burke*, 208 Cal. App. 2d 149, 24 Cal. Rptr. 912 (1962). In that case, police twice entered and searched a hotel room in the occupants' absence, without a warrant but with the manager's permission. The California District Court of Appeals held the entries and searches unlawful, rejecting arguments exactly like those made by the State here:

> "In the cases before us, the evidence does not establish that the [hotel] manager, Mrs. Murray, either had actual authority to consent to the entry by the police into the defendant's room, or that she believed she had such authority, or that the officers reasonably and in good faith believed she had such authority. The record is entirely silent on these questions. Mrs. Murray did not testify at the trial. *The mere fact that a person is a hotel manager does not import an authority to permit the police to enter and search the rooms of her guests.*" 24 Cal. Rptr. at 919. (Emphasis supplied.) [4]

The other cases cited by the State are either irrelevant or tend to sustain petitioner's argument. Obviously, cases in which the defendant himself consented to a search or in which the defendant no longer had any interest in the premises searched are beside the point.[5] Moreover, neither

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[4] In holding the searches unlawful, the court in *Burke* relied on the California Supreme Court's similar decision in *People* v. *Roberts*, 47 Cal. 2d 374, 303 P.2d 721 (1956), that apartment house managers have no apparent authority to consent to searches of tenants' apartments. In *Burke*, the court went on to affirm the appellant's conviction because no property seized during the illegal searches had been introduced at the trial and no evidence introduced at the trial had been "fruit of the poison tree."

[5] Cases cited by the State (Br. pp. 9-10) in which the defendant himself consented include *Davis* v. *United States*, 328 U.S. 582 (1946); *Zap* v. *United States*, 328 U.S. 624 (1946); and *People* v. *Michael*, 45 Cal. 2d

the California decisions grounded upon actual authority nor those grounded upon apparent authority impair the validity of *Burke*.[6] Finally, the actual authority decisions —none of which involved searches and seizures—establish simply that the rights of hotel management *vis-a-vis* guests are such as are agreed upon by the parties, *i.e.*, that "the relation established" between a hotel and its guests "depends upon the contract." *Roberts* v. *Casey*, 36 Cal. App. 2d Supp. 767, 93 P.2d 654, 657 (1939); following *Fox* v. *Windemere Hotel Apt. Co.*, 30 Cal. App. 162, 137 Pac. 820

751, 290 P.2d 852 (1955) (consent by defendant and by her mother, a joint occupant of the premises). Cases cited (Br. pp. 9-10) in which hotel rooms were searched with consent of the management after the defendant had surrendered his room and abandoned property found therein include *Abel* v. *United States*, 362 U.S. 217, 241 (1960), and *Feguer* v. *United States*, 302 F.2d 214, 249 (8th Cir. 1962).

[6] The discussion of the apparent authority of a hotel clerk in *People* v. *Ambrose*, 155 Cal. App. 2d 513, 318 P.2d 181, 188 (1957) seems inconsistent with the decision in *Burke*. However, *Burke* is a later decision and rests upon the California Supreme Court decision in *People* v. *Roberts*. See note 3, *supra*. Moreover, the discussion in *Ambrose* is at best an alternative holding. Finally, on the facts it appears that, whether or not the search in *Ambrose* was legal, the defendant in effect had consented to the seizure. The police entered his hotel room in his absence with the consent of the management, but then left and returned with the defendant himself who assisted the officers by sorting property in the room into that which he had stolen and that which he had not.

In addition to *Burke* and *Ambrose*, the apparent authority cases cited by the State (Br. pp. 11-12) include two in which consent was given by persons who lived in and owned the homes that were searched and who, therefore, unlike a hotel clerk, appeared to be people protected by, and in a position to waive, the constitutional safeguards (*People* v. *Gorg*, 45 Cal. 2d 778, 291 P.2d 469 (1955); *People* v. *Caritativo*, 46 Cal. 2d 68, 292 P.2d 513 (1955)); one case in which the defendant himself waived the immunity by taking a dormitory room subject to school rules providing for inspection (*People* v. *Kelly*, 195 Cal. App. 2d 699, 16 Cal. Rptr. 177 (1961) (consent by master of dormitory)); an additional case, like *Abel*, in which the defendant's right of occupancy had apparently ended (*People* v. *Crayton*, 174 Cal. App. 2d 267, 344 P.2d 627 (1959)); and a case in which the search was conducted pursuant to applicable military regulations (*People* v. *Shepard*, 213 Cal. App. 2d 697, 28 Cal. Rptr. 297 (1963)).

(1916).[7] In other words, if these decisions demonstrate anything relevant, it is that a hotel's "actual authority" to consent to searches of guests' rooms is exactly the same under California law as we say it is under the Constitution —hotels have such authority only if their guests plainly have agreed that they shall.

Thus it is unnecessary for the Court in this case to consider whether consent by a person having only apparent authority may ever validate a search. However, as the State devotes some time to the problem, we feel obliged to respond briefly.

First, we note that the failure of the Court in *Jeffers*, *Lustig*, and *Chapman* even to consider the possible applicability of an apparent authority doctrine strongly suggests that it is alien to Fourth Amendment law. It is true that California decisions are to the contrary; but, so far as we have been able to discover, the California approach does not represent the prevailing view.[8]

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[7] In both *Roberts* and *Fox* the court determined that certain premises were lodging houses rather than apartments. In consequence, in *Roberts* the court held that the owner of such premises could commence unlawful detainer proceedings without first giving notice. And in *Fox* the court held that the owner acquired a lodging house owner's lien on an occupant's luggage when the occupant failed to pay for his room.

In addition to *Roberts* and *Fox*, the State cites *People* v. *Vaughn*, 65 Cal. App. 2d Supp. 844, 150 P.2d 964 (1944), to support its actual authority argument (Br. p. 10). However, the *Vaughn* case held only (1) that a hotel may prohibit strangers from disturbing guests in the course of distributing religious tracts, and (2) that persons who engage in that activity after being requested to leave may be convicted of disturbing the peace.

[8] California decisions appear to be the only "apparent authority" decisions among the numerous cases cited and discussed in Annot., *Authority to Consent for Another to Search or Seizure*, 31 A.L.R. 2d 1079 (1953). For cases in which searches and seizures were held illegal in circumstances where California's "apparent authority" doctrine probably would have required a contrary result, see, *e.g.*, *Holzhey* v. *United States*, 223 F.2d 823 (5th Cir. 1955) (consent by daughter and son-in-law to search of their residence held not to authorize search of mother's locked personal effects found

Nor does the California rule conform with the policy of the Fourth Amendment. We submit that it is not appropriate to tailor that Amendment according to what appears "reasonable" from the perspective of the officer. Rather, the apparent authority doctrine should be viewed from the perspective of the citizen, who is, after all, the beneficiary of the Fourth Amendment. As we read this Court's decisions, the citizen's constitutional right consists of freedom from searches and seizures without a warrant except in circumstances where, for some compelling reason, it would be unreasonable to require a warrant. The apparent authority doctrine, however, would establish an exception to the warrant requirement that would have no justification whatever in terms of necessity. Moreover, we suggest that adoption of such an exception would encourage general searches. If the person from whom consent is sought has no personal stake in the matter, he is not likely to put the police to the test of the warrant procedure by resisting their request. In consequence, in many cases there would be little inducement for the police to submit to the supervision of a magistrate and to the limitations of a warrant when an exploratory search could be so easily made.

The choice comes to this: Whether the citizen should be exposed to the risk of a search being validated because of the "consent" of a third person who is actually without authority, or whether the police should bear the risk of in-

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therein); *United States* v. *Blok*, 188 F.2d 1019 (D.C. Cir. 1951) (consent by defendant's superior in Government agency held not to authorize search of defendant's desk and personal effects found therein); *United States* v. *Rubner*, 51 F.2d 579 (D. Md. 1931) (search of defendant's gristmill in defendant's absence held unlawful notwithstanding consent by defendant's brother-in-law to whom defendant's wife referred the officers as being in charge of the mill); *United States* v. *Sully*, 56 F. Supp. 942 (S.D.N.Y. 1944) (consent to officers' entry by defendant's mother-in-law held not to authorize search).

validation of the search because of such lack of actual authority when they choose to proceed without a warrant. We urge that the policy of the Fourth Amendment requires, as the decisions of this Court in *Jeffers*, *Lustig*, and *Chapman* suggest, that the risk be placed upon the police. "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege," and " 'courts indulge every reasonable presumption against [such] waiver. . . .' " *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). These salutory principles should not be displaced in Fourth Amendment law by doctrines rooted in the law of agency.

II. The Seizure Was Unconstitutional

If the search was unlawful the seizure was also and need not be considered further. But even if the search had been proper, the seizure could not be defended.

The State concedes that the clerk had no authority to consent to the seizure of petitioner's property; but the State contends that, since the clerk did have authority to consent to the search, the officers had authority independent of that consent to seize whatever objects they discovered that were appropriate subjects of seizure (Br. p. 19).[9] The difficulty with this argument is that, as we pointed out in our opening brief, the property seized, except for the gun, was not contraband or the "fruits or instrumentalities" of crime—articles which historically were subject to seizure because their possessor had no right to possession or had forfeited it by using the goods for criminal purposes.

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[9] We note that, in the framework of the State's argument, the "concession" as to the lack of authority by the clerk "to consent to seizure of personal property belonging to another" (Br. p. 19) has no practical importance, since, according to the State, the clerk's authority to consent to the search in conjunction with the officers' authority to seize validated both the search and the seizure.

Rather, petitioner's glasses and clothing, though lawfully his, were seized simply because the police thought they might be useful as evidence. Yet under this Court's decisions seizures of such property, whether or not it is evidence, are not permitted with or without a warrant. "In the one case, the government is entitled to the possession of the property; in the other it is not." *Boyd* v. *United States*, 116 U.S. 616, 623 (1886).

The State replies to the contrary that the glasses and clothing *were* "instrumentalities" (Br. pp. 19-21); and that in any event the "mere evidence" rule should not apply to the States (Br. pp. 15-19).

The first of those contentions was answered in our opening brief. The State's argument that the glasses and clothing were "instrumentalities" rests on nothing more than the fact that the gunman wore clothes—as does everyone—and wore a hat "with the brim turned down" (Br. p. 21)—as does everyone who wears a hat. But the glasses and clothing can hardly be said to be the "means" by which the crime was committed. That is why it is held that ordinary clothes are not "instrumentalities" even when they may have been worn by someone suspected of crime. See *Williams* v. *United States*, 263 F.2d 487 (D.C. Cir. 1959) (coat); *United States* v. *Richmond*, 57 F.Supp. 903 (S.D. W.Va. 1944) (clothing); cf. *Morrison* v. *United States*, 262 F.2d 449 (D.C. Cir. 1958) (handkerchief).

The State's other contention—that the "mere evidence" rule should not apply to the States—is based on the claim that the rule "is without a substantial policy basis" (Br. p. 17). But that is not so, as is demonstrated by this Court's decisions cited in our opening brief (Br. pp. 27-28). The basis for the rule is the policy of the Fifth Amendment as it influences what is deemed "reasonable" for purposes of the relevant Fourth and Fourteenth Amendment

protections. That is, the seizure of a person's property for use against him in a criminal trial is "tantamount to coerced testimony . . .," *Mapp* v. *Ohio*, 367 U.S. 643, 656 (1961), and hence in normal circumstances is an unreasonable seizure. This consideration is not controlling only where it may be said that the property is not really the defendant's, as where it is stolen, or at any rate that the government has a right to seize it independent of its usefulness in prosecuting the possessor, as in the case of property concealed in order to avoid payment of duties. See the extensive discussion in *Boyd*. And while it may be that the ancient laws respecting forfeiture of instruments of crime, such as the law of deodand, have little force today, the consequence of a strict adherence to the policy considerations upon which *Boyd* was grounded would require a narrowing of the right of the State to seize, not a broadening.

There is one further consideration supporting the *Boyd* rule that may be worth noting. The State is contending here for the right to seize, not simply clothing and glasses, but anything that might constitute evidence. In an appropriate case, this would include, for example, the entire books and records of a businessman. This type of seizure of property admittedly owned by another person after only the sort of *ex parte* hearings employed in the search warrant procedure amounts to the taking of property with less than is normally deemed due process. But more, in this case the State contends for the right of the police to seize without any hearing at all. The danger of empowering the police to seize whatever property strikes them as "evidence" is perfectly illustrated in this case; the police carried away not only the gun, glasses and clothing used at the trial, but also address books and "other miscellaneous evidence" (R. 73) which evidently turned out not to be useful. As the State takes pains to point out, the police are

not lawyers (Br. p. 13). Much less should the law treat them as though they were judges.[10]

Finally, assuming *arguendo* that the State is correct in asserting that on the whole society would be better served if the *Boyd* restriction were not applied to the States, it remains true that this restriction is an important ingredient of Fourth Amendment law which has been followed in a host of decisions of this Court and the lower federal courts. (See cases cited on pp. 27-28 of our opening brief.) In consequence, this rule is a part of the "standard of reasonableness [that] is the same under the Fourth and Fourteenth Amendments," rather than a technical limitation that the states may ignore in "developing workable rules governing arrests, searches and seizures . . . ." *Ker* v. *California*, 374 U.S. 23, 33, 34 (1963).[11]

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[10] In connection with this due process consideration, it is instructive to consider California law. As we noted in our opening brief (Br. p. 29 n. 12), a California statute purports to authorize warrants for the seizure of property merely as evidence (Cal. Pen. Code § 1524; Cal. Stats. 1957, c. 1884, p. 3289, § 1). However, it does not necessarily follow, as the State seems to think, that California law purports to authorize such seizures without a warrant whenever the police discover the evidence lawfully. On the contrary, such seizures without a warrant, may be "unreasonable" under California law because of the absence of procedural safeguards such as those provided by the search warrant procedure or by the civil discovery motion for production and inspection. See *Greyhound Corp.* v. *Superior Court*, 56 Cal. 2d 355, 394-395, 364 P.2d 266, 286-287 (1961).

[11] Apart from the character of items seized, there is a further difficulty respecting the validity of the seizure. If the clerk had no right to consent to the seizure, as the state concedes, it appears that the officers could do no more than search without securing a warrant. The State argues that the purpose of the search was to look only for the gun, that the clerk consented to the search for the gun because he was fearful for the safety of the residents of the hotel, and that when the officers came across the other items here in question they had authority to seize them without a warrant (Br. pp. 11, 20-21). It is true that, in the case of a search incident to an arrest, the arresting officers may seize property properly subject to seizure if they discover it in the course of a search aimed at other types of property. *Harris* v. *United States*, 331 U.S. 145, 155 (1946). In the case at bar, however, the State concedes that a search incident to arrest is not involved. Rather, assuming the validity of the State's "consent" argu-

III. Use of the Unconstitutional Evidence at Petitioner's Trial was Not Harmless Error

The use of the unconstitutionally obtained evidence—the gun, glasses and clothing—at petitioner's trial was not mere "harmless error." The State contends that "the prosecution's case was complete without" those items of evidence (Br. p. 27). But, contrary to what the State appears to think, the Court is "not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Fahy* v. *Connecticut*, 375 U.S. 85, 86-87 (1963). Under that test—indeed under any test—the use of the items in question as evidence was far more clearly prejudicial than the use of the paint can and brush with which the Court was concerned in *Fahy*.

The evidence for and against petitioner is summarized in our opening brief (pp. 3-6). The prosecution's case rested on (1) testimony of eyewitnesses to the robbery identifying petitioner, (2) testimony of an alleged accomplice implicating petitioner, (3) testimony of those witnesses that the gun, glasses and clothing looked like the

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ment, it would appear that the appropriate standard would be that which applies to searches pursuant to a search warrant. That is, since the purpose of the officers was only to search, the authority of the officers to seize should be no broader than the terms of the consent, which in this sense is analogous to a warrant. But if the police had secured a warrant for the search for the gun, they could not have seized anything else without a further warrant. "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Marron* v. *United States*, 275 U.S. 192, 196 (1927). No reason appears why, if the consent was in terms of a search for the gun as the State says, the authority of the police to seize should be broader than if they had secured a warrant in like terms.

gun used and the glasses and clothing worn by the gunman, (4) testimony of police officers that the physical evidence had been seized from petitioner's room, and (5) testimony of one police officer that petitioner had orally confessed to the crime. Petitioner's defense, on the other hand, consisted principally of testimony by two witnesses that he had been with them at the time of the crime. He tried to show by cross-examination of the State's witnesses that the eye-witnesses' identifications and the testimony of the alleged accomplice were unreliable, the latter because given in exchange for a light sentence. And he attacked the confession as involuntary on the ground that it had been obtained two days after his arrest but before arraignment under coercive circumstances—which included confrontation with the physical evidence illegally seized from his room (R. 93, 94, 127.)

Thus, it is apparent (1) that the conviction rested upon the jury's resolution of the issue of credibility against petitioner's witnesses and in favor of the State's; and (2) that the jury's resolution of that issue must almost certainly have been influenced by the illegal evidence—the physical evidence seized from petitioner's room and the testimony relating to it—and the confession to which the evidence, at least in part, may well have led.

The State tries to dismiss the illegal evidence as unimportant, although it deemed it sufficiently probative at the time to introduce it over petitioner's objections. The State's theory, now, is that the evidence established only what "similar" objects involved in the robbery looked like. It claims that it could have introduced a similar gun not owned by petitioner "for demonstration purposes" and says that the same is true of the glasses and clothing (Br. pp. 26-27). But that is beside the point. The impact of the evidence lay in the fact that the gun, the glasses, and the clothing were *petitioner's*.

As was said in *Bram* v. *United States*, 168 U.S. 532, 541 (1897):

> "[T]he prosecution cannot on the one hand offer evidence to prove guilt, and which by the very offer is vouched for as tending to that end, and on the other hand for the purpose of avoiding the consequences of the error, caused by its wrongful admission, be heard to assert that the matter offered . . . was not prejudicial because it did not tend to prove guilt."

In short, it is apparent that "there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Fahy* v. *Connecticut*, 375 U.S. at 86-87. Indeed, in this case it is almost a certainty. Accordingly, the conviction should be reversed without reaching the further question whether use of unconstitutional evidence at a trial can ever be "harmless" error—the question not decided in *Fahy*. However, since the State discusses this question we think it necessary to set forth our views briefly.

The Courts of Appeals for the District of Columbia and the Eighth Circuit have held that the admission of evidence seized in violation of the defendant's constitutional rights cannot be harmless error. *Williams* v. *United States*, 263 F.2d 487, 490 (D.C. Cir. 1959); *Honig* v. *United States*, 208 F.2d 916, 921 (8th Cir. 1953). The Court of Appeals for the Second Circuit has held to the contrary. *United States* v. *McCall*, 291 F.2d 859, 860 (1961). We submit that the former view is correct.

The argument that the use of unconstitutionally obtained evidence may be dismissed as mere "harmless error" assumes that the only relevant "prejudice" lies in the impact of the evidence on the jury. It ignores the important "prejudice" inherent in any violation of a constitutional

right. That is, we read *Mapp* v. *Ohio*, 367 U.S. 643 (1961), to mean that the *use* at trial of unconstitutionally obtained evidence is itself a violation of the constitution. If so, the Court should not stop to speculate whether the defendant has been "prejudiced" in any fashion other than being deprived of that to which the Constitution entitled him—a trial at which such evidence is not used.

Our argument finds support in the manner in which the Court deals with other constitutional violations. Thus, if an involuntary confession is used at a trial, the admission of the confession in evidence denies the defendant "a constitutional right" and "requires reversal" without speculation as to its impact on the jury. *Lyons* v. *Oklahoma*, 322 U.S. 596, 597 (1944); *Malinski* v. *New York*, 324 U.S. 401, 404 (1945); *Rogers* v. *Richmond*, 365 U.S. 534, 545 (1960). Or if the accused is deprived of his right to counsel, the Court does "not stop to determine whether prejudice resulted." *Hamilton* v. *Alabama*, 368 U.S. 52, 55 (1961).[12] And if the accused is given a trial by an eleven man jury when the Constitution requires twelve jurors, his conviction must be reversed even though the Court may believe that the "infraction of the Constitution is slight . . . . It is not [the Court's] province to measure the extent to which the Constitution has been contravened . . . ." *Patton* v. *United States*, 281 U.S. 276, 292 (1930).

Moreover, it is difficult to reconcile the harmless error argument with the policies supporting the exclusionary rule. One principal purpose of that rule is to destroy the incentive for constitutional violations. But that incentive will not be destroyed as long as the hope is nurtured that such evidence can be used and then dismissed as harmless.

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[12] If the law were otherwise, *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) did nothing at all to the rule of *Betts* v. *Brady*, 316 U.S. 455 (1942).

A second principal purpose for the rule is to maintain the integrity of the courts. As the Court observed in *Elkins* v. *United States*, 364 U.S. 206, 222-223 (1960):

> "'For those who agree with me,' said Mr. Justice Holmes, 'no distinction can be taken between the Government as prosecutor and the Government as judge.' 277 U.S., at 470. (Dissenting opinion.) 'In a government of laws,' said Mr. Justice Brandeis, 'existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy . . . .' 277 U.S., at 485 (Dissenting opinion.)"

The petitioner in *Fahy* made the relevant point in compelling terms (Br. p. 13):

> "*Mapp* v. *Ohio* teaches that the admission of illegally seized evidence at the trial is a violation by the trial court itself of the constitutional rights of an accused. The problem is now one of direct judicial disobedience to the Constitution, and not merely an indirect judicial approbation of a violation of the constitutional right of privacy by ill trained or lawless police officials. If our trial courts are adjured not to place the stamp of judicial approval upon the illegal acts of law enforcement agencies, still less should our appellate courts gloss over a disregard of constitutional rights by the trial court itself. What lesson will our courts teach if they can dismiss their own disregard of constitutional rights as harmless? The harm done to the accused may

indeed be slight, but the harm done to the reputation of our courts as guardians of our constitutional rights is irreparable."

In short, the use of the illegally seized evidence at petitioner's trial was plainly prejudicial in that it almost certainly contributed to his conviction. But whether it did or not, we think that no special showing of prejudice should be required where a trial is so conducted as to violate the defendant's constitutional rights.

Conclusion

For the foregoing reasons the judgment of the California District Court of Appeal should be reversed.

Respectfully submitted,

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